IN THE MATTER OF MERCHANT MARINER'S DOCUMENT
AND ALL OTHER SEAMAN'S DOCUMENTS NO. Z-1031681
Issued to: Peter MILLOVAN

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1859

Peter MILLOVAN

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 26 September 1969, an Examiner of the United States Coast Guard at New Orleans, La., suspended Appellant's seaman's document for six months upon finding him guilty of misconduct. the specifications found proved allege that while serving as a galley utility on board the United States SS U.S. NAVIGATOR under authority of the document above captioned, Appellant:

(1) on or about 21 February 1969, at a foreign port [sic], assaulted a fellow crewmember with a knife, and

(2) on or about 22 March 1969, at sea, wrongfully failed to perform his duties.

Appellant appeared on notice for the hearing and, after advice by the Examiner that he had the right to counsel, who might be a lawyer, pleaded "not guilty" to the specifications and the charge. He announced that he was ready to proceed. After the Investigating Officer made his opening statement he disclosed to the Examiner that he had no evidence available and would need a continuance of about a week, that Appellant had an attorney with whom he had been in communication, that the attorney could not be present on the schedule date of the hearing, and that he had advised Appellant that he would present no evidence until the attorney was present. The Examiner Advised Appellant to get his attorney and adjourned until 1000 on 3 September 1969.

On 3 September 1969, insofar as the record is concerned, nothing happened. At 1100 on 10 September 1969, the hearing was reconvened, but there is no notice of record regarding the changed time. The Examiner announced: "this hearing was continued from 28 August 1969 at the request of Mr. Millovan, and it was set for Wednesday, 3 September 1969 at 1000 hours [sic]." Without being sworn the Investigating Officer said:

"It was put off a couple of time because he couldn't contact his attorney. It was last Wednesday or Thursday, Mr Millovan called me last week sometime from Port Arthur or Beaumont, and told me he didn't have any funds, that he wanted to sail. I told him that he had the right to sail... he also told me that he had arranged to have an attorney here possibly to defend him and the attorney would contact me yesterday, and the attorney contacted me and told me that he was no longer representing Mr. Millovan and that was it. And Mr. Millovan said if this attorney did not represent him he would dot have representation by anybody else."

The Examiner decided to proceed in absentia. The Investigating Officer introduced into the record voyage records of SS U.S. NAVIGATOR. There was, naturally, no defense offered, since the case proceeded in absentia.

At the end of the hearing, the Examiner rendered a decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of six months.

The entire decision was served on or about 21 September 1970. Appeal was timely filed on 18 September 1970 and was perfected on 4 November 1970.

FINDINGS OF FACT

On all dates in question, Appellant was serving as a galley utility on board the United States SS U.S. NAVIGATOR and acting under authority of his document. Because of the disposition to be made of this case, no further findings are necessary.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Specific allegations of error by Appellant need not be spelled out.

APPERANCE: Charles A. Walker, National Maritime Union, Port Arthur, Texas.

OPINION

I

A minor matter may be mentioned at the outset. The Notice of Hearing (Form CG-2639) in this case refers to the vessel involved as SS NAVIGATOR. The printed form portion of the Examiner's decision (CG-2639A) is filled in with references to SS NAVIGATOR.

All the evidence establishes that the vessel's name was U.S. NAVIGATOR. The references mentioned should therefore have been to "SS U.S. NAVIGATOR, not to "SS NAVIGATOR." The error was not argued on appeal and would not, I believe, on cursory review of Merchant Vessels of the United States, be fatal in any event. On the result there appears to be no doubt that the vessel on which Appellant was serving was "U.S. NAVIGATOR." The formal documents relating charges and decisions should accurately identify a vessel involved if its identity is essential to the allegations or findings. Insofar as the document in this case refer to "SS NAVIGATOR" I must find them inadequate since the documented name of the vessel was "U.S. NAVIGATOR," but I find the error to be non-prejudicial, since it was corrected silently by the evidence and the findings. I mention the matter only so that similar errors may not occur in cases in which the identity of the vessel may be crucial.

II

Be that as it may, there is one thing that causes grave doubts in my mind. Appellant stated flatly on 28 August 1969 that he was ready to proceed with the hearing. It was the Investigating Officer who raised the question of postponement until he could produce evidence to support his charge and who raised the matter of Appellant's representation by counsel. Appellant never said that he desired counsel, on the record.

The Examiner failed to reconvene the hearing on the date schedule at the commendation of the Investigating Officer. When the hearing was reconvened at a later date the Examiner improperly ascribed the adjournment to a request by Appellant rather than to a need by the Investigating Officer, and accepted an ex part unsworn statement by the Investigating Officer as reason to proceed in absentia. The flaws in this procedure are almost too numerous to mention, but mention will be tried.

The Examiner never adverted to the fact that notice of proceedings had been given for 1000, 3 September 1969, but that no proceedings had been had at that time, or until any time until the unscheduled proceeding of 10 September 1969. by 10 September 1969, if the record is to be believed, there must have been unrecorded communications among the person charged, the investigating officer, some attorneys for the person charged, and the examiner.

The problem of adequacy of notice of proceedings on 10 September 1970, rather than on 3 September 1970, as the Examiner had announced in the presence of Appellant, underlies my thinking in this case.

Appellant was present at the first session of the hearing. Had he not been present proof of notice of hearing would have been required so that proceedings in absentia could have been commenced. Once absent, after proper notice, a person charged forfeits all right to further notice of future proceedings. This is not what occurred in this case.

The unsworn statement of the Investigating Officer was that he had talked with Appellant shortly before 10 September 1969, by telephone at Port Arthur or Beaumont, and had been advised that Appellant had no funds and could not return to New Orleans because he needed work, and would consent to a hearing in absentia on 10 September 1969 if a certain attorney could not appear for him. If this and been testimony under oath the case would stand in a different posture, but I am not sure that it would be satisfactory.

The important points causing difficulty here are that Appellant appeared on notice on 28 August 1969 and announced, after having been advised by the Examiner of his right to counsel, that he was ready to proceed. The Examiner accepted Appellant's pleas obviously with the understanding that Appellant was proceeding without counsel. It was not until the Investigating Officer declared his need for a postponement that the possibility of counsel came up. Appellant was never consulated on the matter or heard to say anything. He was summarily ordered to return on 3 September with an attorney he had not indicated, on the record, a desire to have.

For aught I know, Appellant was present and still ready to proceed at 1000, 3 September, with or without an attorney, and left New Orleans some time thereafter without notice of a postponement to 10 September.

It is easily possible that a proper record could have been made in this case, but speculation cannot fill in the gaps. Some lessons can be gleaned by both investigating officers and examiners from the mere recitation of the narrative of proceedings given above, but one point must be emphasized: when notice has been given as to date and time of a scheduled proceeding, such as that set for 1000 on 3 September 1969 in this case, something should be made of record at the scheduled time to preserve the continuity of notice of to establish default. There are so many ways in which this record could have been preserved that no attempt can be made to spell them out here.

The errors here could be corrected by a remand. Remand would necessarily have to be made to another examiner, since the Examiner in this case is no longer available to the agency. To determine whether such a procedure is justified, I look to the merits of the

case.

III

The first specification alleges a serious offense, assault with a knife. The mere statement of the offense, when found proved, makes the suspension ordered the minimum that could reasonably be imposed, and if there was a possibility that correction of procedural errors could be expected to support remedial action in an area of serious seaman's misconduct remand would be not only appropriate but almost necessary.

When I look at the evidence adduced about the assault with a knife alleged in this case I believe that reversal on the merits is proper.

All the evidence is documentary. It consists of an official long book entry and two statement attached thereto and incorporated by reference. The master's entry, as pertinent, reads "[Appellant]... became involved in an argument [sic] Peter Millovan pulled a knife on the Wiper Raul Quinones, in doing so he cut himself on the right leg (thigh) requiring doctor's treatment. See attached statement."

I need not explore here whether from a statement that a person "pulled a knife" on another person an inference of assault with the knife may be drawn, since the reader is specifically referred to the attached statements, which must be considered to be the only basis for the log entry.

The statement of the alleged victim reads, as pertinent:

> "...I told him that I was doing nothing wrong to him. Then he told me he was going fixed me. and he went to his room and brought a knife. I told him that I had no knife. That if he wanted to cut me he was able to do it. About half a hour later I was call to the Master then, there they that he was cut but I did not know that before."

The statement of the other witness reads:

> "...I don't know what they were arguing [sic] about. Milovan [sic] had a knife in his hand, but didn't have any intention to use it. They were arguing [sic] for 15 minutes."

Under the law of assault, there is not a shed of evidence here that Appellant attempted to cut the alleged victim with a knife nor

that he conducted himself in such a manner that the alleged victim was placed in apprehension of danger.

It is clear to me that on the evidence of record (and since a statement by the alleged victim is already included there seems no possibility that a stronger case could be made out) reversal on the merits is required as to the assault specification.

IV

It remains then to consider whether the other specification found proved is of such a serious nature as to warrant further proceedings in this case. The offense is spelled out thus in the log entry:

> "Peter Millovan Galley Utility threw 10 pounds of shrimp overboard in order to keep from peeling same. Millovan also quit work, went to his room and refused to perform any further duties."

I take note that this can be accepted as proof that Appellant failed to perform duties on the date in question. It would not, however, establish that Appellant had refused to obey an order, had he been so charged. Nevertheless, actions taken by the master for this offense was based on the fifth and seventh items of 46 U.S.C. 701-item five deals with disobedience of orders, item 7 with damaging ship's stores. The master invoked the provisions of item 7 to enforce a forfeiture of wages for the value of the shrimp; and the authority under item 5 to place Appellant in irons.

The fact that the penal provisions of 46 U.S.C. 701 were invoked by the master is not a bar to action under R.C. 4450 (46 U.S.C. 239), with remedial objectives; these objectives can be pursued whether or not the conduct involved is criminal in nature or not. 46 U.S.C. 239 (h).

However, having found that the evidence available in this case will only establish the specification alleging failure to perform duties I see no useful purpose in reopening proceedings to suspended Appellant's document that deal with the lesser offense.

I reemphasize here that no implication should be inferred that while there may often be an overlap in subject matter, the pursuit of the remedial aims under R.S. 4450 is affected in any way by prior penal or criminal sanctions. My decision means only that under the particular circumstances of this case I will not remand the matter for further proceedings to correct fundamental procedural errors only with respect to a matter upon which sanctions have already been imposed when the more serious offense

alleged cannot be sustained on substantive grounds.

ORDER

The order of the Examiner dated at New Orleans, La., on 26 September 1969, is VACATED. The charges are DISMISSED.

T.R. SARGENT
Acting Commandant, U. S. Coast Guard

Signed at Washington, D.C., this 6th. day of October 1971

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